IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8573

D.C. Docket No.4: 93-00181-CV

Filed March 27, 1995

IN RE: HAROLD F. YOUNGER,

Debtor.

DONNA E. YOUNGER,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee,

ROBERT L. COLEY, Assistant U.S. Trustee; JAMES L. DRAKE, JR.; PAUL GREGORY JUSTICE, Assistant United States Attorney,

Interested Parties.

Appeal from the United States District Court
for the Southern District of Georgia

Before TJOFLAT, *Chief Judge*, BARKETT, *Circuit Judge*, and CLARK, *Senior Circuit Judge*.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Case Number: CV493-181

IN MATTER OF:
HAROLD F. YOUNGER,

Debtor.

DONNA E. YOUNGER,

Appellant,

—v.—

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict, considered.

Decision by Court. This action came [deleted] before the Court. The issues have been [considered] and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the decision rendered on the 15th day of April 1994, the Order of Bankruptcy Court has been affirmed except for the Bankruptcy Court alternative holding.
April 15, 1994

Henry R. Crumley, Jr.
Clerk

Nicole M. Thomas
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Case Number: CV493-181

Filed April 15, 1994

In the matter of
Harold F. Younger,

Debtor.

Donna E. Younger,

Appellant,

—vs.—

United States of America,

Appellee.

ORDER

Appellee United States of America (United States) filed an application for administrative expenses seeking compensation of expenses incurred by the United States Marshals Service (Marshals Service) due to the incarceration and subsequent need for medical treatment of the debtor, Harold F. Younger

(Mr. Younger). Donna E. Younger (Mrs. Younger), Mr. Younger's former wife and primary creditor, opposed recovery of these expenses on the ground that they were personal to the debtor and not beneficial to the estate. By order dated June 16, 1993, the bankruptcy court held that the expenses were entitled to administrative expense priority. *See Matter of Younger*, 163 B.R. 609 (Bankr. S.D. Ga. 1993). This appeal by Mrs. Younger ensued.

BACKGROUND

As part of the civil divorce action instituted by Mrs. Younger against Mr. Younger, the Superior Court of Chatham County entered a judgment of $912,635.00 on January 10, 1992, against Mr. Younger to restore Mrs. Younger's non-marital property. Mr. Younger exhausted all appellate remedies on March 12, 1992. Between March 13 and March 18, 1992, Mr. Younger transferred substantial amounts of money from local brokerage firms to out-of-town banks; he later withdrew the money from these banks and dispersed it by cashier's checks payable to relatives and friends who claimed no interest in the money. On March 18, 1992, Mrs. Younger discovered that Mr. Younger's residence telephone had been disconnected and that all furniture had been removed from his apartment. She was later informed that Mr. Younger had moved from the apartment approximately two weeks earlier.

On March 27, 1992, Mrs. Younger filed an involuntary Chapter 7 petition against Mr. Younger. Mr. Younger could not be personally served, and the bankruptcy court ordered service by publication. In response to Mrs. Younger's motion, the bankruptcy court entered an order on April 28, 1992, requiring Mr. Younger to submit to an examination pursuant to Bankr. R. 2004 on May 5, 1992. Mr. Younger failed to appear at this examination. He also failed to file a statement of financial affairs and a schedule of assets and liabilities due on June 10, 1992, under a court order.

On June 11, 1992, Mrs. Younger moved the bankruptcy court for an order directing the Marshals Service to bring Mr.

Younger before the court without unnecessary delay for the purpose of a hearing under Bankr. R. 2005(a).[1] The bankruptcy court referred this matter to the undersigned judge to determine whether the relief sought should be considered by that court or this court. On June 12, 1992, this Court withdrew the reference for the limited purpose of considering Mrs. Younger's motion. The Honorable John F. Nangle, United States District Judge, granted Mrs. Younger's motion on June 16, 1992, and ordered the United States Marshal of any district in which Mr. Younger may be found to apprehend him to insure his appearance for the Rule 2004 examination. The Marshals Service apprehended Mr. Younger on June 25, 1992, and ordered his transfer to this district.

The Honorable G. R. Smith, United States Magistrate Judge, ordered Mr. Younger to submit to a Rule 2004 examination. During the June 27, 1992, examination, Mr. Younger invoked his Fifth Amendment privilege against self-incrimination. Although this Court and the Superior Court of Chatham County subsequently granted Mr. Younger immunity from prosecution, Mr. Younger continued to refuse to testify at a Rule 2004 examination. While he was incarcerated for refusal to testify, Mr. Younger was hospitalized and underwent surgery for a heart condition and gall bladder problems.

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[1] That section provides as follows:

> On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal . . . an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

Bankr. R. 2005(a).

On November 20, 1992, this Court found Mr. Younger in contempt of court for his continued refusal to testify.[2] As a result of Mr. Younger's incarceration, hospitalization, and surgeries, the Marshals Service incurred expenses totalling $111,854.45. The bulk of these expenses went toward paying Mr. Younger's medical care.

On October 2, 1992, and on April 5, 1993, the United States filed applications for allowance of these expenses. Despite Mrs. Younger's objections that the expenses were incurred for the personal benefit of the debtor, the bankruptcy court found that these expenses were entitled to administrative priority for two reasons: They preserved the estate, and they continued the viability of the bankruptcy process by allowing incarceration of a debtor to coerce his compliance with federal law.

DISCUSSION

Mrs. Younger contends that the bankruptcy court erroneously found that administrative expenses under 11 U.S.C. § 503(b) include the costs incurred in executing an order to bring a debtor before the court, in holding a debtor in custody as ordered by the court pending completion of a Rule 2004 examination, and in providing medical services to an incarcerated debtor. She claims that the health care expenses are Mr. Younger's personal living expenses, not those of the estate; that these expenses do not confer a benefit to the estate; and that the costs should not be treated as an unlisted expense under section 503. The United States counters that Mr. Younger's incarceration prevents him from further concealing the property of the estate and that the Marshals Service has a constitutional obligation to provide reasonable medical care to incarcerated persons. As noted by the bankruptcy court and the parties, this case presents a question of first impression.

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[2] Although this Court ordered Mr. Younger incarcerated indefinitely, the Eleventh Circuit found that 28 U.S.C. § 1826 required his release at the end of the court proceeding or eighteen months, whichever is less. *Matter of Younger*, 986 F.2d 1376 (11th Cir. 1993).

In evaluating these claims, the Court reviews the bankruptcy court's findings of fact under the clearly erroneous standard, and reviews the bankruptcy court's conclusions of law de novo. *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381 (11th Cir. 1990). The bankruptcy court, however, has broad discretion in applying section 503(b). *Sapir v. C.P.Q. Colorchrome Corp. (In re Photo Promotion Assocs., Inc.)*, 881 F.2d 6 (2d Cir. 1989); *accord Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700 (9th Cir. 1988).

Section 503(b) generally

The applicable statute provides in pertinent part as follows:

> (b) After notice and a hearing, there shall be allowed, administrative expenses. . . , including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. . .

11 U.S.C.A. § 503(b)(1)(A) (1993). Although certain types of administrative expenses are listed in the statute, the designations contained in section 503(b) are not exhaustive since use of the word "including" in the statute is not limiting. 11 U.S.C. § 102(3) (1993); *accord United States v. Crenshaw (In re Allied Mechanical Servs., Inc.)*, 885 F.2d 837 (11th Cir. 1989). Expenses not explicitly listed in the statute can receive administrative expense status in one of two ways: as a nonlisted "actual, necessary" expense of preserving the estate under section 503(b)(1)(A) or as a nonlisted administrative expense under section 503(b) in general. *Alabama Surface Mining Comm'n v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.)*, 963 F.2d 1449 (11th Cir. 1992); *see generally* 3 L. King, Collier on Bankruptcy ¶ 503.03 (15th ed. 1993).

In *N.P. Mining*, the Eleventh Circuit examined whether punitive civil penalties assessed by the state for postpetition strip mining qualified as an administrative expense in a Chapter 11 case. The court first noted the interpretation of section

503(b)(1)(A) given by other courts: "Any claim for administrative expenses and costs must be the actual and necessary costs of *preserving the estate for the benefit of its creditors*." *N.P. Mining*, 963 F.2d at 1454 (*quoting Dant & Russell*, 853 F.2d at 706) (emphasis added).[3] It then noted that this restrictive interpretation ignored policies involved in section 503(b) and that the Supreme Court had not construed the section narrowly. *Id.* at 1454. It quoted the following passage from *Reading Co. v. Brown*, 391 U.S. 471, 484-84 (1968)(emphasis added):

> . . ."[A]ctual and necessary costs" should include *costs ordinarily incident to operation of a business*, and not be limited to costs without which rehabilitation would be impossible . . . In *some cases* arising under Chapter XI it has been recognized that "actual and necessary costs" are not limited to those claims which the business must be able to pay in full if it is to be able to deal at all.

Id. Since only "some cases" in which costs ordinarily incident to operation of a business are afforded administrative expense priority, the Eleventh Circuit found that a policy of ensuring compliance by trustees with state law served as sufficient justification for affording punitive civil penalties administrative expense priority as nonlisted "actual, necessary costs and expenses of preserving the estate" under section 503(b)(1)(A). *Id.* at 1458-59. This result accrued even though the expenses conferred no actual benefit upon the estate. *Id.* at 1454.

After discussing *N.P. Mining*, the bankruptcy court concluded that the expenses and costs at issue were entitled to administrative expense priority for two reasons. First, the expenses and costs were necessary and served to preserve the estate in that Mr. Younger's incarceration halted his dissipation of the estate. Second, even if Mr. Younger's incar-

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[3] An earlier Eleventh Circuit case discussing section 503(b) held that "there must be an actual, concrete benefit to the estate before a claim is allowable as an administrative expense." *Broadcast Corp. of Georgia v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530, 1532 (11th Cir. 1986) (citation omitted) (discussing administrative expense priority of an executory contract).

ceration was not necessary to preserve the estate, "the ultimate power to incarcerate a debtor under Bankruptcy Rule 2005 for the purpose of guaranteeing his appearance at a Bankruptcy Rule 2004 examination and thereafter to attempt to coerce his compliance with federal law is of such critical importance to the viability of the bankruptcy process that the costs incident to that incarceration are no less deserving of priority classification than the costs incident to operating a business." *Younger*, 163 B.R. at 612. The bankruptcy court also held that the allowances were not subject to disallowance as unnecessary, rejecting Mrs. Younger's argument that the expenses were incurred for the personal well-being of Mr. Younger.

Treatment as an actual and necessary expense

As noted above, the bankruptcy court found that the expenses incurred by the Marshals Service were necessary to preserve the estate and had served to protect the estate. Mr. Younger's incarceration "guarantee[d] his inability to conceal himself and substantially restrict[ed] his ability to transfer or conceal his assets." *Id.* On appeal, Mrs. Younger maintains that the costs of detaining Mr. Younger conferred no benefit upon the estate because the Marshals Service has not actively attempted to locate assets for the estate and that Mr. Younger's continued refusal to submit to a Rule 2004 examination has resulted in no additional information to the estate.

Mrs. Younger's arguments fail to address the bankruptcy court's finding that Mr. Younger's incarceration *prevented* him from further dissipating or concealing property of the estate. Mrs. Younger briefly addresses this holding in her argument that costs of medical care should not be treated as an administrative expense. Br. of Appellant, p. 13. She states that "[t]his rationale may purport to explain the expenses for the actual detention of [Mr. Younger] but it is impossible to conceive how, if at all, the provision of medical care to the Debtor prevented him from concealing assets." *Id.* Even if Mr. Younger's incarceration has not resulted in his willingness to testify at a Rule 2004 examination, his arrest and

incarceration have conferred an actual and necessary benefit on his estate: Mr. Younger's ability to transfer or hide his assets, the event precipitating the involuntary petition filed by Mrs. Younger, has been limited by his incarceration. In fact, during the pendency of this matter, nearly $400,000.00 of Mr. Younger's assets have been obtained by the Trustee. *Younger*, 163 B.R. at 610.

In sum, incarceration of Mr. Younger conferred an "actual, concrete benefit" upon the estate by allowing the recovery of $400,000.00 and served to preserve the estate by precluding Mr. Younger from further transfers to dissipate the estate. Although Mr. Younger ultimately did not testify at a Rule 2004 examination, his incarceration secured his attendance at any such examination. As a result, the costs of incarceration of Mr. Younger are entitled to administrative expense priority as nonlisted "actual, necessary costs and expenses of preserving the estate" pursuant to section 503(b)(1)(A).

Medical care rendered to the debtor

Even if the costs of incarceration benefitted the estate by stopping Mr. Younger from dissipating his assets, Mrs. Younger contends that the estate should not bear the expenses of Mr. Younger's medical care while incarcerated. Mrs. Younger makes several arguments: the United States has the responsibility for providing medical care to persons in its custody, the expenses benefitted the debtor personally, and she should not be penalized for invoking her right to discovery.

Since Mr. Younger's incarceration conferred an actual and necessary benefit upon the estate, all costs attendant to that incarceration, including the current medical expenses, should be borne by the estate. When the Marshals Service incarcerated Mr. Younger pursuant to lawful order of the bankruptcy court, it assumed constitutional and statutory duties to provide him with reasonable medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (discussing government's Eighth Amendment obligation "to provide medical care for those whom it is punishing by incarceration"); 18 U.S.C.A. §§ 4005, 4006 (1985) (instructing furnishing and payment of medical care).

By invoking the process described in Rule 2005, Mr. Younger's creditors—in this instance, his wife—instituted an action admittedly to benefit the estate.[4] Upon the creditor's invocation of Rule 2005, the Marshals Service had no choice but to provide medical care to Mr. Younger during his incarceration; accordingly, the estate should bear this burden.

Given the constitutional and statutory duties to provide medical care to Mr. Younger, the expenses of medical care incurred by the Marshals Service cannot be considered personal to Mr. Younger. The underlying benefit to the bankruptcy estate renders the four cases relied upon by Mrs. Younger inapposite since each case involves an expenditure of no benefit to the estate. *See United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986) (denying administrative expense treatment to support payments for the debtor's wife and children); *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14 (Bankr. 9th Cir. 1988) (refusing to permit debtor use of estate assets to pay for debtor's personal living expenses since such an action would benefit only the debtor, not the estate); *In re Deraves*, 81 B.R. 127 (Bankr. S.D. Fla. 1987) (declining to allow the debtor to use estate property to purge a contempt sanction in state court); *In re Vincent*, 4 B.R. 21 (Bankr. M.D. Tenn. 1979) (refusing to permit payment of necessary living expenses from assets of the estate despite the fact that the debtor suffered a heart attack).

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[4] Mrs. Younger appears to concede that the arrest pursuant to Rule 2005 benefits the estate. Her appellate brief states as follows:

> The bankruptcy court also pointed out that the costs and fees of the Marshals Service were incurred because of the "result of a court order sought by a private litigant [Mrs. Younger], a creditor who expected or hoped to reap a benefit from utilizing this procedure." (p. 11). However, with all due respect to the Bankruptcy Court, it has misconstrued the purpose of Fed. R. Bank. P. 2005. The procedure outlined under Fed. R. Bankr. P. 2005 is not a remedy that is available for the benefit of a creditor. . . Rather, **it is a procedure employed for the benefit of the bankruptcy process as a whole** in order to bring the debtor before the court for the purposes of a Rule 2004 examination.

Br. of Appellants, p. 11 (emphasis added).

Mrs. Younger finally contends that giving administrative expense priority to these expenses would penalize her for securing a Rule 2004 examination of Mr. Younger. As part of this argument, she notes that Rule 2005 is employed to benefit the bankruptcy process as a whole in that it allows parties to obtain information from a reluctant debtor who refuses to cooperate with a Rule 2004 exam. Her explanation of the process belies her argument that having creditors bear the costs of incarceration penalizes her; By allowing the arrest of Mr. Younger, the bankruptcy court ensured that his creditors, including Mrs. Younger, would have a chance to obtain information from an elusive debtor and halt the spread of vanishing assets. While Mrs. Younger is Mr. Younger's only known creditor at the present time, requiring payment of these expenses from the bankruptcy estate does not penalize her; it benefits her and the bankruptcy process as a whole.[5]

Treatment as a nonlisted expense under N.P. Mining

Mrs. Younger attacks the bankruptcy court's alternative holding that coercing Mr. Younger's compliance with federal law is of such vital importance to the bankruptcy process that costs incident to incarceration are no less deserving of priority classification than the costs incident to operating a busi-

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[5] Although not cited by either party, the Court has considered the following statute:

> The expenses attendant upon the confinement of persons arrested and committed under the laws of the United States . . . shall be paid out of the Treasury of the United States in the manner provided by law.

18 U.S.C.A. § 4007 (1985 & Supp. 1994). Section 4007 does not change the result in the case at bar. The costs of Mr. Younger's incarceration and medical care initially were paid out of the Treasury; nothing in the statute prevents the United States from seeking repayment from the responsible party. In fact, within the criminal context this statute serves as authorization for U.S.S.G. § 5E1.2(i). Pub. L. 100-690, 102 Stat. 4463 (1988) (*cited in* 18 U.S.C.A. § 4007 (Supp. 1994)). Section 5E1.2(i) permits a court to impose an additional fine upon a convicted defendant in an amount "at least sufficient to pay the costs to the government of any imprisonment . . ." Section 4007's authorization of section 5E1.2(i) indicates that the United States properly may seek all costs of incarceration from the responsible party.

ness. In reaching this conclusion, the bankruptcy court rejected Mrs. Younger's argument that *N.P. Mining* turned on the fact that the fines were incidental to the operation of a business and stated that "policies other than benefit to or preservation of the estate operate[d] to confer administrative expense priority." *Younger*, 163 B.R. at 612.

This Court believes that *N.P. Mining* requires that the claimed costs be ordinarily incident to the operation of a business. *N.P. Mining* analyzed *Reading*'s holding that in "some cases," costs ordinarily incident to operation of a business could be afforded administrative expense priority. The civil fines at issue in *N.P. Mining* fell into the "some cases" category because they were ordinarily incident to operation of the debtor's business *and* a strong federal policy, compliance with state law, existed. *N.P. Mining*, 963 F.2d at 1458. In the case at bar, only one of the *N.P. Mining* factors existed; a strong federal policy. Accordingly, the expenses sought by the Marshals Services are not entitled to administrative expense priority under *N.P. Mining*.

Conclusion

In this unusual case of first impression, the Court finds that the costs and expenses attendant to Mr. Younger's incarceration are entitled to administrative expense priority as actual and necessary costs of preserving the estate. Since the costs of incarceration necessarily include the costs of Mr. Younger's medical care, these expenses also are entitled to administrative expense status. The Court disavows the bankruptcy court's alternative holding under *N.P. Mining* since these costs were not ordinarily incident to operation of a business.

SO ORDERED this 15th day of April, 1994.

B. AVANT EDENFIELD

B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Chapter 7, Case Number 92-40607
Filed June 16, 1993

In the matter of:

HAROLD F. YOUNGER,

Debtor

ORDER ON MOTION OF UNITED STATES OF AMERICA FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE

This case presents a question of first impression of immense difficulty. Debtor is before this court as a result of an involuntary proceeding filed by his ex-wife, Donna Younger. She claims that Debtor is obligated to her as a result of a divorce decree in the amount of $912,635.00 (*see* proof of claim filed 10/20/92) . Debtor allegedly violated the terms of a Superior Court injunction against transferring any property following the divorce which led to the filing of this case whereby the ex-wife sought to preserve and collect his assets and subject them to creditors' claims. Debtor could not be served personally at the outset of the case and service by publication was ordered. He subsequently obtained actual notice of the pendency of this case but failed to answer the involuntary petition which led to entry of an order for relief. *See Matter of Younger*, Chapter 7 Case No. 92-40607, Adv. No. 92-4156, slip op. at 9 (Bankr. S.D.Ga. May 13, 1993). On April 28, 1992, this court issued an order requiring Debtor to attend a Rule 2004 examination. Debtor did not respond to the

order. The Debtor also failed to respond to the court's order of May 26, 1992, requiring a schedule of assets and liabilities to be filed with the court. Subsequently, Mrs. Younger, having difficulty tracing Debtor's assets, petitioned the court to issue an order for Mr. Younger's apprehension in order to compel his attendance at the 2004 examination. *See* Order signed by United States District Court Judge John F. Nangle directing Debtor's apprehension filed June 16, 1992, and attached as Government's Exhibit "I" to the Application for Allowance of Administrative Expenses and Assessment of Fees. Debtor was mailed, on or about May 31, 1992, a notice of commencement of bankruptcy case listing the required meeting of creditors as June 22, 1992. Debtor received actual notice of the bankruptcy proceedings, and nevertheless failed to appear at the creditors' meeting scheduled in June. *See generally Matter of Younger, supra*, slip op. at 7-9. Debtor was arrested on or about June 25, 1992, when a United States Magistrate Judge in Jacksonville, Florida, issued an order requiring the United States Marshal to return Debtor to Savannah. *See* Exhibit "J" to the Government's application.

Debtor was brought to this jurisdiction and attended a Rule 2004 examination on June 27, 1992. However, he refused to answer any questions concerning his estate citing his privilege against self incrimination. Thereafter, Mrs. Younger sought and obtained a determination that granted Debtor immunity from prosecution pursuant to 11 U.S.C. Section 344. He was thereafter ordered to respond and continued to refuse. He remained incarcerated during the period of his refusal to testify. Ultimately, he was cited for contempt for his failure and refusal to testify after the grant of immunity, found by the United States District Court to be in contempt, and incarcerated. *See* Exhibit "K" Plaintiff's Brief in Response to Motion to Dismiss Adversary Proceeding No. 92-4156. He remains in federal custody despite repeated advice that he would be released in the event his testimony was given as ordered.

At some point in this long process Debtor became ill and was hospitalized with heart problems. He underwent surgery while in the custody of the United States Marshals Service pursuant to the Bankruptcy Rule 2005 order. Later he developed gall bladder problems and surgery was performed to correct that problem as well.

The claim asserted by the United States Marshals Service in this proceeding is for repayment of the expenses incurred for Debtor's arrest, custody, and medical treatment while in custody. The Service seeks allowance of its claim in the amount of $111,854.45 for these expenses as a claim entitled to administrative priority pursuant to 11 U.S.C. Section 503(b)(1)(A) which provides in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate . . . .

The United States contends that all the expenses incurred are actual and necessary costs to preserve the estate under these facts where a contemptuous debtor who has concealed evidence concerning his assets has forced a creditor to invoke the most coercive methods available to force debtor to comply with the dictates of federal law. But for the order to incarcerate Debtor he clearly would never have made an appearance or voluntarily complied with any legal obligations related to this case. But for his incarceration Debtor would have been free to secrete himself and freely transfer and conceal his assets. During the pendency of this case nearly $400,000.00 of Debtor's assets have, in fact, been obtained by and are presently held by the Trustee. On these facts the United States argues that administrative expense priority is warranted as these costs were necessary to preserve the estate or alternatively, to the extent that no specific benefit can be shown, are allowable under Eleventh Circuit authority which

accords priority to certain post-petition expenses not expressly listed in Section 503.

Mrs. Younger contends that, as to all or most of the expenses and particularly the medical expenses, they are post-petition expenses that benefit the Debtor personally and not the estate and should be classified as post-petition debts incurred by Debtor that will not be discharged. Obviously, allowance of these expenses will deplete the estate presently worth $400,000.00 from which Mrs. Younger can be paid by an additional $111,854.45. Since her claim alone exceeds $900,000.00 she cannot be paid in full from funds in the Trustee's hands—thus, any allowance of administrative expense for these items reduces dollar for dollar her ultimate recovery.[1]

The perversity of this case is that in truth neither Mrs. Younger nor the United States should be penalized for the costs arising out of Debtor's conduct which is so contemptuous and reprehensible to be beyond words. Unfortunately, however, that cost must be borne by one or the other of them unless and until additional assets are recovered or post-bankruptcy collection efforts succeed where bankruptcy law has failed. The parties agree that this is a case of first impression on which neither side has found controlling authority. Thus, there is no precedent either for allowing or denying the relief sought.

In making this determination it is clear that the allowance of such claims is an area where the court is accorded broad discretion. *See In re Butcher*, 108 B.R. 634, 636 (E.D.Tenn. 1989). Clearly an expense such as this is not expressly enumerated in the statute. However, "the use of the word 'includ-

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[1] In actuality it is unknown whether Debtor has any other creditors since he has never filed schedules or testified concerning his financial affairs. *See* Transcript of Examination of Debtor filed July 17, 1992. If, in fact there are other creditors Mrs. Younger's share of the estate would be diluted and allowance of this or any other administrative expense would reduce her ultimate recovery pro-rata rather than dollar-for-dollar. For purposes of this order reference to Mrs. Younger shall be deemed to include other creditors who are hereafter identified.

ing' as the last word in the lead-in sentence of Section 503(b) . . . is not limiting. A court might well conclude that there are to be allowed as administrative expense claims not necessarily precisely covered by the provisions of Section 503(b)." *Collier* at 503-17. The Eleventh Circuit has cited *Collier* with approval and held that the express items listed in Section 503 are not limiting. As *Collier* notes, the Code makes no attempt

> to enumerate specifically all of the potential items of expense which could constitute "the actual, necessary costs and expenses of preserving the estate" . . . .

3 L.King, *Collier on Bankruptcy*, ¶ 503.04[1][a][i] at 503-19 (15th Ed. 1991).

The latest interpretation of Section 503(b) of the Bankruptcy Code by the Eleventh Circuit is found in *In re N.P. Mining Co., Inc.*, 963 F.2d 1449 (11th Cir. 1992). The precise issue before the court was whether and for how long post-petition, punitive, non-tax penalties can be accorded administrative expense status under Section 503(b). Recognizing the federal policy of requiring trustees to operate an estate in compliance with state law, the court held that punitive, civil penalties assessed post-petition against a Chapter 11 debtor as punishment for environmental violations qualified as administrative expenses to the extent they were incurred as consequences of mining operations while debtor's strip mining business was still operating. *Id.* at 1453.

In reaching its holding, the Eleventh Circuit emphasized the inclusive nature of the language in Section 503(b):

> The legislative history of Section 503(b), as well as the legislative history of other relevant sections of the Bankruptcy Code, is silent regarding the treatment of punitive postpetition penalties. It is clear from the face of the statute, however, that expenses not explicitly listed in Section 503(b) can receive administrative-expense status in one of two ways, either as a nonlisted "actual, necessary" expense of preserving the estate

> under 503(b)(1)(A) or as a nonlisted administrative expense under 503(b) in general. Either way, there is room in the statute for courts to accord administrative-expense priority to postpetition expenses, and courts have given this status to certain categories of postpetition claims that are not explicitly listed in the statute.

963 F.2d at 1452. *See also In re Allied Mechanical Services, Inc.*, 885 F.2d 837 (11th Cir. 1989) (where the court held that, notwithstanding the legislative silence under Section 503(b), the United States was entitled to administrative expense priority on its claim in Chapter 7 liquidation for interest accrued on tax liability incurred while debtor was operating under Chapter 11 reorganization).

In *N.P. Mining, supra*, the Eleventh Circuit rejected a narrow interpretation of Section 503(b)(1)(A) and expressly found that administrative expenses could be awarded based upon other policy considerations, without a specific finding that there was a measurable benefit to the estate. *N.P. Mining* at 1454. In doing so the court allowed as administrative expenses punitive civil fines for environmental violations incident to the operation of a business above and beyond any clean up costs and in the absence of any proof that any of the violations constituted a health hazard or imminent risk to public safety.

While Mrs. Younger's counsel argues that the outcome in *N.P. Mining* turned on the fact that the fines were incidental to the operation of a business, and therefore is not controlling, I find the rationale of *N.P. Mining* to be broader. The court recognized that policies other than benefit to or preservation of the estate operate to confer administrative expense priority. It found Congress' intent to be that "first priority claims include claims other than those that serve to preserve the bankruptcy estate." *Id.* at 1456. Because of the policy established in 28 U.S.C. Section 959(b) the Eleventh Circuit ruled that the fines were allowable administrative expenses even though the result would be to deplete the estate.

I conclude that the expenses at issue are entitled to administrative expense priority for two reasons: First, I find the expenses and costs were necessary and have served to preserve the estate. By his conduct Debtor clearly could be expected to conceal and transfer assets. His incarceration, after refusal to abide by the Code requirements for disclosure and specific court orders to testify, guarantees his inability to conceal himself and substantially restricts his ability to transfer or conceal his assets. Absent his incarceration it is obvious that Debtor would have engaged in conduct that would dissipate the estate. While the monetary benefit may be incapable of exact quantification the existence of benefit is undeniable. Certainly this creditor expected that a benefit would accrue from the actions taken in her behalf and should not now be heard to complain that the benefits are "hypothetical and highly speculative" particularly when she could at any time prior to the adjudication that Debtor was in contempt have moved the court to release Debtor. *See* page 5 of Mrs. Younger's Brief filed May 18, 1993. Having failed to do so, and thus continued the accrual of these expenses it is highly inconsistent to complain of "purported benefits" of the expenses incurred by the Marshals Service.

Second, even if necessity to preservation of the estate is in question I find that the ultimate power to incarcerate a debtor under Bankruptcy Rule 2005 for the purpose of guaranteeing his appearance at a Bankruptcy Rule 2004 examination and thereafter to attempt to coerce his compliance with federal law is of such critical importance to the viability of the bankruptcy process that the costs incident to that incarceration are no less deserving of priority classification than the costs incident to operating a business. *See generally Reading Co. v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 1766-67 (1968). These expenses should not be borne by the United States. It incurred these expenses not as a volunteer but as the result of a court order sought by a private litigant, a creditor who expected or hoped to reap a benefit from utilizing the procedure. However, these expenses should not be borne by a peti-

tioning creditor alone but by the creditors as a group for whose benefit the estate is administered.[2]

Finally, the expenses are not subject to disallowance as unnecessary. Contrary to the assertions of Mrs. Younger's counsel that they were incurred for the "personal well-being of the debtor" I find that they were not incurred principally for that reason. Instead, medical services were rendered pursuant to the government's responsibility toward individuals in custody to provide necessary medical care[3] and pursuant to the creditors' desire to continue, even after Debtor's health condition was known, to maintain Debtor in custody as a tool to secure his cooperation. That Debtor may incidentally have benefitted does not alter the fact that the motivation for the incarceration was not altruistic on the creditors' or the Marshals Service part.

For the foregoing reasons, I hold that the expenses incurred by the United States Marshals Service in the amount of $111,854.45 are allowed and entitled to administrative expense priority pursuant to 11 U.S.C. Section 503(b)(1)(A).

LAMAR W. DAVIS, JR.
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 10th day of June, 1993.

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[2] While in practice Mrs. Younger, as the largest creditor, may bear the brunt of this expense it is because of her status as a creditor not because she initiated the action.

[3] *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989).